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Supreme Court, U.S.
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Case Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROSE RUIZ,

Petitioner,

v.

BARBARA MCDONNELL,
Executive Director of the Colorado Department of Human Services, COLORADO DEPARTMENT OF HUMAN SERVICES, WALTER SPECKMAN, Executive Director of the Weld County Department of Human Services, THE WELD COUNTY DEPARTMENT OF HUMAN SERVICES, RENEE L. and CHARLES GALLEGOS, VICTORIA and LEROY GALLEGOS, and JOHN DOES numbers one through four,

Respondents.

Certiorari from the U.S. Court of Appeals for the Tenth Circuit
Case Number 01-1010

PETITION FOR A WRIT OF CERTIORARI

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129 pp

I. Questions presented for review

A. In this civil rights case involving the death of an infant at the hands of a licensed day care provider, whether the Petitioner adequately stated a claim for relief under a "danger creation theory" cause of action sufficient to overcome a motion to dismiss where the allegation was that no pre-licensing investigation was conducted by the state entities, contrary to federal and state law enacted for the welfare of the children, that the failure to conduct investigations was a practice, policy and custom of the state entities, and that such an investigation would have disclosed the applicants' long term history of domestic violence and child abuse?

B. Whether the Tenth Circuit Court of Appeals applied the correct standard of review for the dismissal of a civil rights complaint?

C. Whether the "shocks the conscience" standard is too subjective to be a part of the continued well-reasoned analysis of our substantive due process jurisprudence?

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II. Parties

The parties to this case are listed on the caption of the petition.

III. Prior decisions

In the United States District Court for Colorado, the Order dismissing the case was entered by the Honorable Wiley Y. Daniel in case number 00-D-951. Oral and Written Order attached as Appendix "A." The Order of dismissal was affirmed by the Tenth Circuit Court of Appeals in a published opinion issued August 8, 2002. Opinion attached as Appendix "B." The Tenth Circuit's decision may be found at 299 F.3d 1173 (10th Cir. 2002).

IV. Statement of jurisdiction

The Opinion sought to be reviewed was issued on August 8, 2002. A petition for rehearing was requested and denied by written Order entered September 17, 2002. Order attached as Appendix "C." Jurisdiction on certiorari is

invoked pursuant to 21 U.S.C. §2101(c) and S.Ct. R. 10 and 12.

V. Reasons for granting the writ

A. Introduction

Petitioner asserts there exist important and compelling reasons for the grant of a writ of certiorari in this case pursuant to S.Ct. R. 10. Petitioner claims that the decision of the Tenth Circuit Court of Appeals is in conflict with other circuits and with Tenth Circuit's own prior decisions. The decision of the Tenth Circuit Court of Appeals is also in conflict with other circuits over the standard of review on dismissal of a civil rights complaint. S.Ct. R. 10(a). The importance of the questions improperly resolved in this case have an important and widespread impact on the accountability of state agencies when they do not follow their own laws and regulations as well as federal laws and regulations that are enacted for the safety of

children. The important and compelling reasons for the grant of the writ are expanded in the "Argument" section below.

B. Statement of the case and factual background

On May 8, 2000, a complaint was filed in the United States District Court for Colorado alleging civil rights violations and various ancillary state claims in case number 00-D-951. Jurisdiction was invoked under 28 U.S.C. §§ 1331 & 1343 as well as 42 U.S.C. §§ 1983 & 1988, and United States Constitution Amendments V & XIV.

The succinct factual basis of the complaint was that the state and its agents had licensed a day care facility for infants and other children operated from a private home without conducting the requisite background check required by state and federal guidelines. Such a background check would have shown that the applicant and her husband had an extensive history and pattern of domestic violence in their home. The day care facility in question was part of a

federally-funded program for the licensure of federally subsided day care programs.

Barbara McDonnell and the Colorado Department of Human Services, as well as private defendants Victoria and Leroy Gallegos filed motions to dismiss the Complaint under F.R.C.P. 12 (b).

Plaintiff responded to the various motions to dismiss in several ways. On July 14, 2000, the Plaintiff filed a document titled, "Amended Response to Defendant Colorado Department of Human Services and Barbara McDonnell's Motion to Dismiss." Plaintiff also responded to the Private Defendant's Motion to Dismiss. Both parties of Defendants filed Reply Briefs.

The Trial Court conducted a hearing on the pending dispositional motions on October 19, 2001. After accepting argument, the Trial Court orally granted the State Defendants' motion to dismiss because Plaintiff had not

demonstrated that the "defendants acted with the reckless degree of culpability or in a conscience shocking manner." Specifically, the Court stated "[R]egrettably, I don't find that the conduct here shocks my conscience." Appendix "A." Having dismissed the civil rights claims, the Court then denied supplemental jurisdiction as to all other defendants except for the one that had defaulted. This action, combined with the entry of default, resolved all the claims against all the Defendants.

Subsequently, Plaintiff filed a Motion For Reconsideration of the Court's Oral Order. The motion for reconsideration included a report of internal audits of the Colorado State Department of Human Services that showed repeated failure to conduct background checks on persons applying for federal aid in state operated child care and foster care situations. The State responded with a pleading. The Plaintiff replied. The Trial Court issued a written order

affirming its earlier oral order and denying the Plaintiff's motion for reconsideration in its December 4, 2000 ruling (Appendix "A").

The Notice of Appeal from the Trial Court's Order was filed on January 5, 2001, the day of court business after the thirty day time frame for filing the Notice of Appeal. After briefs by the parties and oral argument, the Tenth Circuit Court of Appeals issued a published decision affirming the Order of the Trial Court. The Tenth Circuit's decision may be found at 299 F.3d 1173 (10th Cir. 2002).

The following facts are extrapolated from the Complaint and the Amended Complaint, as well as the pleadings relating to the motions to dismiss. The allegations of the complaints are recited here as facts, because a court reviewing the sufficiency of a complaint presumes all of Plaintiff's factual allegations are true and construes them in a light most favorable to the Plaintiff. Hall v. Bellmon, 935

F.2d 1106, 1110 (10th Cir. 1991)(citing, e.g., Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

On or about August 5, 1998, the Plaintiff entered into an agreement with Renee Gallegos doing business as Tender Heart Childcare for Ms. Gallegos to provide child care services for the Plaintiff's child, J.R. Child care services for the infant, J.R., pursuant to the agreement began that date. The child care provided by Renee Gallegos (d\b\a Tender Heart Daycare) occurred in the Gallegos family home, which is located at 1423 29th Ave. Ct. in Greeley, Colorado. The home was jointly occupied by the second defendant, Charles Gallegos, who is the husband of Renee Gallegos. Both defendants benefitted monetarily from the arrangement to provide services for the infant, J.R. The Plaintiff, as mother of the child J.R., was referred to Tender Heart Daycare by the Weld Co. D.H.S., who represented Tender Heart Daycare as a duly licensed and authorized child care program under state

regulations and statutes for which federal assistance programs had been authorized. In selecting Tender Heart Daycare, the Plaintiff relied on the referral of Weld Co. D.H.S., and the licensing screening procedures enacted and executed by Colorado D.H.S., as such policies were enacted and executed through its Executive Director, Barbara McDonnell, as well as the licensing investigation functions delegated to the Weld County Department of Public Health and Environment as such policies were enacted and executed through its Executive Director, Dr. John Wallace.

On October 17, 1998, the child suffered a traumatic injury while in the Gallegos' home-based day care. The injury was caused by Renee Gallegos' act of violently shaking the seven week-old infant, J.R. As a direct and proximate result of Renee Gallegos' shaking the infant, J.R. suffered a traumatic brain injury, retinal injury, and other forms of internal head bruising (cerebral and subdural) and

injury. J.R. suffered from these injuries, remaining alive under medical supervision until November 10, 1998, at which time the infant passed away. The injuries suffered by J.R. on October 17, 1998 were the proximate cause of his demise on November 10, 1998. Renee Gallegos admitted the allegations of negligent child abuse resulting in death in a criminal case prosecuted in Weld County, Colorado criminal case number 98CR1808. She was subsequently sent to prison in that case.

Tender Heart Daycare was a "Family Child Care Home" as that phrase is used in Colorado Revised Statutes (hereafter "C.R.S.") section 26-2-102(4), and Code of Federal Regulations (hereafter "C.F.R."), 45 C.F.R. subtitle A section 98.2. As a Family Child Care Home, Tender Heart Daycare was licensed by the Colorado State Department of Human Services (hereafter "Colo. D.H.S."), acting under authority of its Executive Director, and C.R.S. section 26-6-

102(4.5) & (5.5), as well as section 26-6-111. The Colorado State Department of Human Services, under authority of its Executive Director and C.R.S. section 26-6-110 and 42 U.S.C. section 9858(b) is the lead agency for the State of Colorado for disbursement of federal funding for child care services pursuant to 42 U.S.C. 9801 *et seq*. Tender Heart Daycare, and Colo. D.H.S. were disbursed federal funds through the Colo. D.H.S. and its local representative, the Weld County Department of Human Services (hereafter "Weld Co. D.H.S."), which also received federal funding as a part of the operation of Tender Heart Daycare and the operations of state and federal law.

Prior to the time when Tender Heart Daycare was licensed by the Colo. D.H.S.(under authority of its executive director and state and federal statutes and guidelines), Charles and Renee Gallegos had an extensive history of domestic violence documented in proceedings available

through a simple search of court records. Renee and Charles Gallegos' history of domestic violence and criminal behavior is documented in approximately sixteen cases spanning the period of time from 1986 to 1995. The record includes a felony deferred judgment for Charles Gallegos, misdemeanor assault allegations by Charles and Renee Gallegos against each other (which resulted in the court ordering them both into counseling), numerous applications for domestic violence restraining orders (which resulted in the court ordering them both into counseling), and several applications for divorces. There is no record Charles and Renee Gallegos ever completed a course of counseling for the domestic violence problems prior to being afforded a child daycare license.

Regulations and standards promulgated under C.R.S. section 26-6-106 also require proof of valid public liability insurance. General Rules for Child Care Facilities, section

7.705.13. All persons and entities in paragraph 24 above, failed to require proof of an adequate and valid insurance liability insurance policy from the license applicants or directly from Tender Heart Daycare. At the time the injuries were inflicted upon J.R., no valid liability policy was in effect to provide any compensation for the damages suffered by the child, J.R., or the Plaintiff, his mother.

Additional facts will be added in the argument where necessary.

C. Argument why the writ should issue

1. Misinterpretation of the danger creation theory

At one time it was thought that the danger creation theory of government liability would be contingent on the government having custody of the victim. See Youngberg v. Romero, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). However, in DeShaney v. Winnebago

Dept. of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), this Court left this issue open for future construction, by framing the issue, but not deciding it. DeShaney v. Winnebago Dept. of Social Services, 489 U.S. 189, 202 n.9, 109 S.Ct. 998, 1006, 103 L.Ed.2d 249 (1989). Courts since DeShaney, including the Tenth Circuit Court of Appeals, have held that the danger creation theory is not contingent upon the state having a custodial relationship with the third party actor who inflicts harm. Currier v. Doran, 242 F.3d 905, 918 (10th Cir. 2001); Pinder v. Johnson, 54 F.3d 1169, 1177 (4th Cir. 1995); L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992)(DeShaney did not rule that custody is required where state action affirmatively causes the harm).

In County of Sacramento v. Lewis, 523 U.S. 833 (1998), this Court provided additional guidance to determine the parameters of the danger creation theory. Writing for the Court, Justice Souter stated: "Since the time of our early

explanations of due process, we have understood the core of the concept to be the protection against arbitrary action." 523 U.S. at 845. Whether conduct is arbitrary in a constitutional sense depends on whether it shocks the conscience, and was so brutal and offensive that it did not comport with traditional ideas of fair play and decency. Id., 523 U.S. at 847 (citing Whitley v. Albers, 475 U.S. 312, 327 (1986); United States v. Salerno, 481 U.S. 739, 746 (1987)). Whether behavior schocks the conscience is not subject to a mechanical interpretation, but rather by consideration of the history of liberty protection, traditional executive behavior, contemporary practice, and the standards of blame generally applied to them. County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998). Applying the teachings of DeShaney and Lewis, one can draw a distinction between conduct that results from emergency action and that which results from extended opportunities that are teamed with a protracted

failure to care. County of Sacramento v. Lewis, 523 U.S. 833, 853 (1998).

In this case, the conscience shocking conduct is the type that results from extended opportunities that are teamed with a protracted failure to care. Petitioner alleged (with independent evidence to support the claim) that it was the practice and policy of the Colorado State Department of Human Services and Weld County, Colorado's Department of Human Services to not conduct any type of background investigation or verification of public insurance before granting a license to federally subsidized day care programs. These same entities are intimately familiar with domestic violence and child abuse and how those conditions, if untreated, create a clear risk the well being of persons in those environments, especially infants. For this reason, the regulatory and statutory framework requires that certain procedures be undertaken for states to receive federal aid.

Despite the knowledge of the obvious risks, and the purpose of the licensing scheme, the State entities in this case adopted a practice of licensing any person who sought a day care license without inquiring if any of the safety and insurance requirement were met. For most common people, the State's representation that a day care is licensed coupled with the State's failure to investigate anything about the background of the applicants and the existence of a policy of public insurance is conscience shocking.

Principally, the Tenth Circuit Court of Appeals found that Petitioner alleged no affirmative conduct that shocks the conscience, the District Court's Order should be affirmed. Opinion at page 16, appendix "B." The affirmative conduct here is the act of providing a license. Part of the this act is a sin of omission, not commission. "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was

merely passive, it is as much an active tortfeasor as if it had thrown him into a snake pit." Ford v. Johnson, 899 F.Supp 227, 233 (W.D. Pa. 1995)(quoting Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982), and citing Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989)). Courts should be more mindful of the "tenuous metaphysical construct which differentiates sins of omission and commission." S.S., ex rel. Jervis v. McMullen, 186 F.3d 1066, 1073 (8th Cir. 1999). Other Courts, specifically Mark v. Borough of Hatboro, 51 F.3d 1137 (3rd Cir. 1995), cited with approval on page sixteen of the Tenth Circuit opinion, have phrased the danger creation theory in terms contrary to the affirmative act implication contained in the instant opinion: "the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." Kneipp v. Tedder, 95 F.3d 1199, 1208 (3rd Cir. 1996)(citing Mark, supra). Stated another way, state actors may be liable

if they create the peril, increased the risk of harm, or acted to render them more vulnerable to the danger. Ford v. Johnson, 899 F.Supp 227, 233 (W.D. Pa. 1995)(citing Johnson v. Dallas Ind. School Dist., 38 F.3d 198 (5th Cir. 1994)); see also, Mason v. Barker, 977 F.Supp. 941, 943 (E.D. Ark. 1997)(individual put into dangerous position "he would not otherwise have faced") (citing Carlton v. Cleburne County, Arkansas, 93 F.3d 505, 508 (8th Cir. 1996); Davis v. Fulton County, Arkansas, 90 F.3d 1346, 1350-51 (8th Cir. 1996); Gregory v. City of Rogers, Arkansas, 974 F.2d 1006, 1010 (8th Cir. 1992)). These cases suggest an affirmative act need not be much more than creation of an opportunity, which was clear from the situation created in this case.

The opinion below also misapprehends whether the failure to conduct a background check increased the risk of harm to the decedent. Clearly, even mild attention to the regulations in place would have prevented this unnecessary

death. Charles and Renee Gallegos had an extensive history of domestic violence documented in proceedings available through a simple search of court records. Renee and Charles Gallegos' history of domestic violence and criminal behavior, including child abuse, is documented in approximately sixteen cases spanning the period of time from 1986 to 1995. The record includes a felony deferred judgment for Charles Gallegos, misdemeanor assault allegations by Charles and Renee Gallegos against each other (which resulted in the court ordering them both into counseling), numerous applications for domestic violence restraining orders (which resulted in the court ordering them both into counseling), and several applications for divorces. There is no record Charles and Renee Gallegos ever completed a course of counseling for the domestic violence problems prior to being afforded a child daycare license. Combining this readily available information with the fact

that infant children (J.R. was seven weeks old) were to be cared for all day in this violent household, it is difficult to fathom what about this situation did not present an immediate danger to the children there.

The Tenth Circuit's holding relating to affirmative act also runs contrary to the logic applied in its own decisions. In Sutton v. Utah School for the Deaf and Blind, 173 F.3d 1226 (10th Cir. 1999), the Tenth Circuit court of Appeals found no affirmative act in the school principal's failure to protect a student; however, liability was deemed viable for the principal's failure to adopt a policy or adequately train employees to prevent the assaults from occurring. 173 F.3d at 1239-41. In this case, it is hard to reconcile the result with Sutton, because similar allegations of inadequate training and supervision were indeed made.

Moreover, if an affirmative act was not properly averred, it is hard to understand how deliberate indifference

was not established. "[E]ven though children have no substantive due process right to be protected from abusive parents, the state may not subject children to abuse by knowingly delivering them into the hands of abusive caregivers. S.S., ex rel. Jervis v. McMullen, 186 F.3d 1066, 1073 (8th Cir. 1999)(citing Camp v. Gregory, 67 F.3d 1286, 1294 (7th Cir. 1995)).

For all the foregoing reasons, a writ of certiorari should issues to the Tenth Circuit Court of Appeals.

2. The Tenth Circuit Court of Appeals omitted a critical feature of the standard of review

On pages twelve and thirteen of the Opinion, the Tenth Circuit Court of Appeals recites the standard of review to be applied. Significantly, the Court omits the most important aspect of the standard of review on appeal of a civil rights case: A civil rights complaint must not be dismissed for failure to state a claim unless it appears

beyond a reasonable doubt that plaintiff can prove no set of facts in support of her claim that would entitle her to relief. Currier v. Doran, 242 F.3d 905, 915-916 (10th Cir. 2001)(citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957))(emphasis supplied). Appellant suggests that this Court's misapprehension and omission of this critical feature of the standard of review runs through the entire opinion and requires a writ of certiorari to issue.

3. The shock the conscience standard should be abandoned (Request to re-consider the holding of County of Sacramento v. Lewis, 523 U.S. 833 (1998)).

In County of Sacramento v. Lewis, 523 U.S. 833 (1998), Justice Souter analyzed and attempted to define the parameters of the shock the conscience standard. It is clear that our substantive due process jurisprudence is dedicated to protect fundamental rights and liberties which are violated by State actors. Assuming the purpose of this Court's decisions

is to provide guidance for reasoned and consistent application by lower tribunals, this purpose appears to be thwarted by application of "conscience shocking" as a legal test. As stated by Justice Kennedy, "The phrase has the unfortunate connotation of a standard laden with subjective assessments." County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)(Kennedy, J., concurring). The danger here is that the shock the conscience test is by definition subjective and efforts to place such a standard in an historical and pragmatic context merely obfuscate what is in the end a subjective determination. Washington v. Glucksberg, 521 U.S. 702, 720-722 (1997); County of Sacramento v. Lewis, 523 U.S. 833, 860 (1998)(Scalia, J., concurring) While a particular case may be notable for shocking the conscience of a federal judge or justice, continued endorsement of this standard can only increase the subjectivity of substantive due process

determinations by courts below. The application of this test caused a result in this case that was indeed subjective.

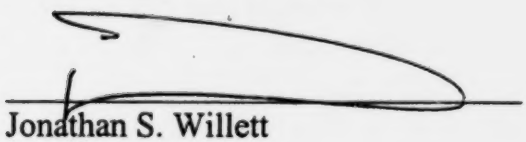
D. Conclusion

Special and important reasons have been shown to grant the writ of certiorari requested by this Petition. The reasons concern misapplication of existing standards by the Tenth Circuit Court of Appeals, inconsistent application of those standards, and the need for invocation of this Court's supervisory powers to correct and instruct lower courts. Over and above these concerns, Petitioner is compelled to assert that the citizens of Colorado, and Ms. Ruiz in particular, have a right to expect that their Governmental bodies will at least abide by their own laws and regulations when it comes to public health and safety. This is common sense and particularly true as we find ourselves in a profound time in which people have lost trust in many institutions upon which we rely daily. When people let each other down,

accountability through court process is all that remains to re-assemble the lives of those affected. Petitioner respectfully requests that this Court consider issuing a writ of certiorari to the Tenth Circuit Court of Appeals in this case so that the interests of justice and consistency may be better served.

Dated: 2-14, 2003.

Respectfully submitted,
Willett & Mestas, LLC



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ROSE RUIZ,

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BARBARA MCDONNELL,
Executive Director of the Colorado Department of Human Services, THE COLORADO DEPARTMENT OF HUMAN SERVICES, CHERYL ESTRICH, RENEE L. and CHARLES GALLEGOS, VICTORIA and LEROY GALLEGOS, and JOHN DOES numbers one through four,

Respondents.

Certiorari from the U.S. Court of Appeals for the Tenth Circuit
Case Number 01-1010

APPENDIX "A" WRITTEN AND ORAL ORDER OF THE TRIAL COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 00-D-951

ROSE RUIZ,

Plaintiff,

v.

BARBARA MCDONNELL, Executive Director of the Colorado Department of Human Services, THE COLORADO DEPARTMENT OF HUMAN SERVICES, CHERYL ESTRICH, RENEE L. and CHARLES GALLEGOS, VICTORIA and LEROY GALLEGOS, and JOHN DOES numbers one through four,

Defendants.

ORDER

THE MATTER is before the Court on several motions: Plaintiff's Amended Motion for Leave to File a Reply and for Extension of Time to File the Reply and Notice of Appeal, filed November 21, 2000; State Defendants' Motion to Strike Newspaper Articles Appended to Plaintiff's Motion, filed November 13, 2000; Plaintiff's

Motion for Reconsideration of Order of Dismissal or Relief from Judgment Pursuant to F.R.C.P. 59, filed October 30, 2000; Plaintiff's Renewed Motion for Leave to Amend the Complaint to Add Dr. John Wallace, Executive Director of the Weld County Department of Public Health and Environment, and the Weld Department of Health and Environment, filed July 28, 2000; Plaintiff's Motion for Default Judgment Pursuant to F.R.C.P. 55 against Renee L. Gallegos, filed July 11, 2000; Defendants Colorado Department of Human Services and Barbara McDonnell's Motion to Dismiss (Incorporating Supporting Authorities), filed June 23, 2000; and Defendants Victoria and Leroy Gallegos' Motion to Dismiss, filed June 19, 2000. A hearing was held on the motions to dismiss on October 19, 2000.

This case arises out of the alleged violent shaking of Plaintiff Rose Ruiz' infant son, J.R., by Defendant Rene Gallegos, while Gallegos was providing child care for J.R. in Gallegos' home. J.R. died shortly thereafter as a result of the

incident. Plaintiff's Amended Complaint brings a section 1983 claim against several state defendants for violation of Plaintiff and J.R.'s due process rights and various state law claims against Defendant Renee and Charles Gallegos and their parents, Defendants Leroy and Victoria Gallegos.

I first address Defendants Colorado Department of Human Services and Barbara McDonnell's ("State Defendants") Motion to Dismiss. State Defendants move to dismiss the section 1983 claim against them for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) and for failure to state a claim under Fed.R.Civ.P. 12 (b)(6). State Defendants argue that the claims against them are barred under the Eleventh Amendment and, further, even if the allegations in the Amended Complaint are true, they fail to rise to the level of conscience shocking conduct necessary to violate the due process clause of the Fourteenth Amendment. Because I agree with State Defendants' latter

argument, I find that State Defendants' motion to dismiss should be GRANTED.

On a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the court "'must accept all the well-pleaded allegations as true and must construe them in the light most favorable to the plaintiff.'" David v. City and County of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996), cert. denied, 118 S.Ct. 157 (1997) (quoting Gagan v. Norton, 35 F.3d 1473, 1474 n. 1 (10th Cir. 1994). "A complaint may be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) only 'if the plaintiff can prove no set of facts to support a claim for relief.'" Id. (quoting Jojola v. Chavez, 54 F.3d 488, 490 (10th Cir. 1995).

The Due Process Clause of the Fourteenth Amendment provides that no state "shall deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Generally, state actors are liable under the Due Process Clause only for their own acts and not for the violent acts of third parties. DeShaney v. Winnebago

County Dept. of Social Services, 489 U.S. 189, 196-97 (1989); Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995). However, liability may attach only under two limited exceptions to the rule: (1) the special relationship doctrine; and (2) the "danger creation" theory.

Here, there is no "special relationship" between Plaintiff and the state. "[I]f the state restrains an individual's freedom to act to protect himself or herself through a restraint on that individual's freedom to act to protect himself or herself through a restraint on that individual's personal liberty [through incarceration, institutionalization, or other similar restraint of personal liberty], the state may thereby enter into a 'special relationship' during such restraint to protect that individual from violent acts inflicted by others." Armijo v. Wagon Mound Public Schools, 159 F.3d 1253, 1261 (19th Cir. 1998). There is no such relationship based on the facts in Amended Complaint. Renee Gallegos is not alleged to be a state employee and her

day-care center is not alleged to be a state facility. Further, Plaintiff took J.R. to Renee Gallegos of her own free will. Therefore, the state did not restrain J.R.'s freedom or otherwise establish a custodial relationship with the infant. Thus, since the special relationship doctrine does not apply to these facts, I turn to the danger creation exception.

Under the "danger creation" exception, a state may be liable for an individual's safety "if it created the danger that harmed the individual...provided that the other elements of a § 1983 claim have been satisfied." Uhlrig, 64 F.3d at 572. "[T]he danger creation theory must ultimately rest on the specifics of a substantive due process claim, i.e., a claim predicated on reckless or intentionally injury-causing state action which 'shocks the conscience.'" Id. Under this theory, Plaintiff must establish that:

> (1) [Plaintiff and J.R. were members of a limited and specifically definable group; (2) Defendants' conduct put Plaintiff and J.R. and other members of that group at substantial risk of serious,

> immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.

Id. at 574.

To satisfy the "shock the conscience" standard, plaintiff must demonstrate "a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." Id. at 574. This requires more than a showing that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. See id. The Tenth Circuit has also held that under certain circumstances "[w]here the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience." Radecki v. Barela, 146 F.3d 1227, 1232 (10th Cir. 1998).

Further, a plaintiff must show that defendants' affirmative acts subjected plaintiff to the injury-causing

danger. See Graham v. Independent School Dist., No. 1-89, 22 F.3d 991, 995 (10th Cir. 1994) ("This state-created danger doctrine 'necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger.'") (quoting L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992)). "'Inaction by the sate in the face of a known danger is not enough...the state must have limited in some way the liberty of a citizen to act on this own behalf.'" Id. at 994 (quoting Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993)), cert. denied, 510 U.S. 947 (1993). Moreover, "foreseeability [on the part of the state] cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship." Id. at 994.

Applying the foregoing principles to the facts as alleged in the Amended Complaint, I find that Plaintiff has failed to state a claim. Plaintiff asserts that State Defendants' failure to conduct appropriate background checks prior to licensing Renee Gallegos to operate a day-care facility

exhibited conscience shocking calculated indifference to the possibility that Gallegos was ineligible for such a license and a danger to infants placed in her care. See Amended Complaint, at ¶¶ 34-37.[1] Even if such allegations of inaction were true, they would nonetheless fail to state a claim, absent a custodial relationship. Plaintiff does not allege that Defendants had any actual knowledge of Renee Gallegos' violent tendencies. Instead, she argues that reckless inattention to state regulations and procedures created the possibility of danger to Plaintiff and her son. Such facts do not rise to the level of conscience-shocking affirmative conduct or indifference. J.R.'s death is simply '"too remote a consequence of [defendants'] action to hold them responsible under the federal civil rights law.'" Graham, 22 F.3d at 995

[1] At the October 19, 2000 hearing, State Defendants argued that Plaintiff lacked standing to bring her section 1983 claim on behalf of her deceased son without being the infant's duly appointed representative. However, the Court stated at the October 19, 2000 hearing that it would grant Plaintiff a continuation within which to cure any defects with respect to representing her son's interests in this case. The Court therefore permitted Plaintiff to assert claims under section 1983 on behalf of her son for purposes of defending against State Defendants motion to dismiss.

(enrolling student in school prior to school officials' knowledge of other student's violent propensities did not constitute affirmative action under the danger creation theory, quoting Martinez v. State of California, 444 U.S. 277, 285 (1980)). Accordingly, Plaintiff has not alleged facts which would establish a constitutional violation.

I next turn to Plaintiff's motion for reconsideration. Following the October 19, 2000 hearing at which the Court indicated that Plaintiff's 1983 claim should be dismissed. Plaintiff moved for reconsideration. After reviewing Plaintiff's motion, I conclude that the motion should be DENIED.

'"A motion for reconsideration is proper when the court has 'made a mistake not of reasoning but of apprehension...[or] if there has been a significant change or development in the law or facts since submission.'" M.M. v. Zavaras, 939 F. Supp. 799, 801 (D. Colo. 1996) (quoting FDIC v. Hildebrand, 892 F. Supp. 1317, 1319-20 (D. Colo.

1995)), appeal dismissed, 98 F.3d 1349 (10th Cir. 1996); EEOC v. Foothills Title Guar. Co., 1991 WL 61012 at *3 (D. Colo. 1991), aff'd, 956 F.2d 277 (10th Cir. 1992). The Tenth Circuit further holds with respect to these motions as follows:

> When a court enunciates a rule of law in the course of a given case, the law of the case doctrine generally requires the court to adhere to the rule throughout the proceedings...Courts have generally permitted a modification of the law of the case when substantially different, new evidence has been introduced, subsequent, contradictory controlling authority exists, or the original order is clearly erroneous.

Zavaras, 939 F. Supp. at 801 (quoting Major v. Benton, 647 F.2d 110, 112 (10th Cir. 1981)) (citations omitted).

In her motion, Plaintiff apparently urges the Court to reconsider its ruling on the record at the October 19, 2000 hearing on the grounds that the Court's ruling was clearly erroneous. Plaintiff argues that the Court misread the Tenth Circuit's opinion in Uhlrig v. Harder, 64 F.3d 567 (10th Cir.

1995), by claiming that under Uhlrig Plaintiff need only allege facts indicating that State Defendants were reckless in order to withstand a motion to dismiss. Plaintiff also attaches several newspaper articles discussing the inadequacies of the state regulatory scheme over child care and decrying the fact that individuals with criminal backgrounds have been licensed by the state as child care providers.

Plaintiff's arguments are unavailing. I disagree the Uhlrig does not require Plaintiff to allege conduct that shocks the Court's conscience and I affirm my prior ruling for the reasons stated above. See Uhlrig, 64 F.3d at 572-74. Further, Plaintiff's news articles do not otherwise persuade me that my findings as stated above on the record and at the October 19, 2000 hearing were clearly erroneous. Plaintiff's motion is therefore denied.

Finally, because I have dismissed Plaintiff's only federal claim, I decline to exercise supplemental jurisdiction over Plaintiff's remaining state claims, with the exception of

the motion for default judgment against Renee Gallegos. See United International Holdings, Inc. v. Wharf (Holdings) Limited, 210 F.3d 1207, 1220 (10th Cir. 2000).

Accordingly, it is

ORDERED that Defendants Colorado Department of Human Services and Barbara McDonnell's Motion to Dismiss (Incorporating Supporting Authorities), filed June 23, 2000, is GRANTED. Plaintiff's section 1983 claim for violation of Plaintiff and J.R.'s due process rights is dismissed. It is

FURTHER ORDERED that Plaintiff's Motion for Reconsideration of Order of Dismissal or Relief from Judgment Pursuant to F.R.C.P. 59, filed October 30, 2000, is DENIED. It is

FURTHER ORDERED that Plaintiff's Renewed Motion for Leave to Amend the Complaint to Add Dr. John Wallace, Executive Director of the Weld County Department of Public Health and Environment, and the Weld Department

of Health and Environment, filed July 28, 2000, is DENIED AS MOOT. It is

FURTHER ORDERED that Defendants Victoria and Leroy Gallegos' Motion to Dismiss, filed June 19, 2000, is DENIED AS MOOT. It is

FURTHER ORDERED that State Defendants' Motion to Strike Newspaper Articles Appended to Plaintiff's Motion, filed November 13, 2000, is DENIED AS MOOT. It is

FURTHER ORDERED that Plaintiff's Amended Motion for Leave to File a Reply and for Extension of Time to File the Reply and Notice of Appeal, filed November 21, 2000, is GRANTED IN PART AND DENIED IN PART. Plaintiff's request for an extension of time within which to file the accounting of damages sought against Defendant Renee Gallegos and within which to file a notice of appeal is granted. Plaintiff shall file the accounting and her notice of appeal **by Friday, January 5, 2000**. Plaintiff's request for

an extension of time within which to file a reply brief to her motion for reconsideration is denied. It is

FURTHER ORDERED that the remaining claims against all remaining Defendants except Renee Gallegos are dismissed without prejudice. It is

FURTHER ORDERED that Plaintiff's Motion for Default Judgment Pursuant to F.R.C.P. 55 against Renee L. Gallegos, filed July 11, 2000 is DEFERRED pending further briefing on Plaintiff's damages as stated above and on the record at the October 19, 2000 hearing.

DATED at Denver, Colorado, this _____ day of December, 2000.

BY THE COURT:

_____

Wiley Y. Daniel
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-D-951

ROSE RUIZ,

Plaintiff,

vs.

BARBARA McDONNELL, Executive Director of the Colorado Department of Human Services, THE COLORADO DEPARTMENT OF HUMAN SERVICES, WALTER SPECKMAN, Executive Director of the Weld County Department of Human Services, THE WELD COUNTY DEPARMENT OF HUMAN SERVICES, RENEE L. and CHARLES GALLEGOS, VICTORIA and LEROY GALLEGOS, and JOHN DOES numbers one through four,

Defendants.

REPORTER'S TRANSCRIPT
Hearing on Pending Motions

Proceedings before the HONORABLE WILEY Y. DANIEL, Judge, United States District Court for the District of Colorado, commencing at 2:10 p.m. on the 19th day of October, 2000, in Courtroom C-200, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography,
Transcription Produced via Computer by Kara Spitler, RMR,
CRR, 1929 Stout Street, P.O. Box 3592, Denver, CO, 80294,
(303) 623-3080

APPEARANCES

ADKINS, SMART, WILLETT & MESTAS, (by Jonathan Willett), 1129 Pennsylvania Street, Denver, CO 80203, for plaintiff.

ATTORNEY GENERAL, (by Friedrick Haines), 1525 Sherman Street, 5th Floor, Denver, CO 80203, for defendants McDonnell, Colorado Department of Human Services.

WITWER, OLDENBURG, BARRY & BEDINGFIELD, LLP, (by Patrick Groom) 822 7th Street, Suite 760, Greeley, CO 80631, for defendants Victoria and Leroy Gallegos.

PROCEEDINGS

(In open court at 2:10 p.m.)

THE COURT: You may be seated.

This is 00-D-951, Rose Ruiz vs. Barbara McDonnell and others.

Counsel enter their appearances.

MR. WILLETT: Good afternoon, Judge. Jonathan Willett for the plaintiff. She's also present here at plaintiff's table.

MR. HAINES: Good afternoon, Your Honor. I'm Friedrick Haines, assistant attorney general, for defendants Barbara McDonnell and the Colorado Department of Human Services.

MR. GROOM: Good afternoon, Your Honor. Patrick Groom appearing on behalf of defendants Victoria and Leroy Gallegos.

THE COURT: First thing I want to take up is that there was a motion for default judgment filed against defendant Renee Gallegos because there was a failure by defendant Renee Gallegos to respond to the complaint. And it's clear to the Court that entry of a default judgment is appropriate. What I don't know of course is what the amount of the judgment should be. The law makes it clear that the court cannot enter a default judgment without a hearing

where there's some concern about the amount of the claim and there has to be some ability to determine with some certainty what the claim is based on, some appropriate mathematical calculation. So while I believe that there is a basis for the Court to enter a default judgment against Renee Gallegos, there's nothing in the file that tells me what you're really asking for. So are you prepared to do that hearing today, or do we need to reschedule that?

MR. WILLETT: Judge, if the Court deems this okay, what I'd like to do is perhaps submit a calculation for the Court to base the judgment upon and essentially see if that meets the Court's requirements for that.

THE COURT: Well, what, do you have any sense of what the basis of that calculation might be?

MR. WILLETT: I think it's mostly going to be based upon the nature of the loss of consortium, the loss of the care of the child, the loss of the child's contribution to the family,

things of that nature which were originally pleaded in the complaint.

THE COURT: Let me have you go to the podium. Let me just expand on this. Let me ask you to go to the microphone.

MR. WILLETT: Oh. Certainly.

THE COURT: I have had these hearings before, but I've never had one sort of in this situation where a young person who was – how old was the infant when he died?

MR. WILLETT: A few weeks old.

THE COURT: Okay. You're going to have to give me some parameters for what you're asking for. So it can't just be because the infant died at a very young age and so therefore the mother has lost his companionship and consortium and contributions he may have made at the time. So it has to be a damage perspective from someone who has some expertise in the area through an affidavit or through some legal test that's set forth in a case that would give the

Court some frame of reference. And I do suspect that whatever judgment this is, at least for now, it may be more a paper judgment than a judgment where you can actually recover money, but nonetheless, the Court's not going to bypass the requirement that the amount has to be something that is supported by some reason, appropriate reason.

MR. WILLETT: I understand what the Court is saying. I think how I would normally base this type of calculation would be upon the life expectancy tables and essentially try and extrapolate using those. That's how I would normally present these kinds of damages at a trial. So if the Court grants me leave to do this, I would prepare a written pleading with those kinds of numbers.

THE COURT: I'll let you do that. And I guess what I'm really saying is that there has to be some discernible methodology which supports what you're asking for. And that has to be based upon either legal authorities or some approach that's supported by an affidavit from someone who

has knowledge, and I'm not telling you what to do, but I'm just telling you that has to be there.

How much time do you need to put that together?

MR. WILLETT: I would say probably – with an expert's affidavit, probably a month.

THE COURT: All right. I'll give you 30 days or until November – I'll give you to Monday, November 20, to file your submission in support of default judgment against Renee Gallegos.

Now, Charles Gallegos is represented by you?

MR. GROOM: No, Your Honor. We're representing only the parents.

THE COURT: What about Charles Gallegos? Did he respond?

MR. WILLETT: Judge, I was going to actually ask for some guidance from the Court on that. Mr. Gallegos sent to me in the mail something that he denominated as an answer. He essentially denied the allegations of the

complaint and – but didn't put any return address or anything like that on there. And I guess in good faith, as an officer of the court, I couldn't really say for sure that that constituted a default.

And my – as a housecleaning measure in this hearing, I was going to ask the Court whether it considered that answer sufficient. Does the Court even know what I'm talking about?

THE COURT: No, I don't know. Do we have a record of Charles Gallegos filing something with the court, Robb?

Off the record.

(Discussion off the record)

MR. WILLETT: I can show the Court what I received if that might speed things up.

THE COURT: Well, my law clerk says he did file a written answer. If he filed a written answer on his own behalf, then at least he responded.

MR. WILLETT: Right.

THE COURT: So there's really nothing I need to do today about that. Depending upon what happens at today's hearing, of course, there will either be a case left or there won't be a case. If there is a case, then we'd have to have a scheduling conference and of course he would be required to appear at that.

Let's move forward. Here is what I want to do first. There are several motions that are before the Court for consideration. The first is plaintiff's renewed motion for leave to amend to add Dr. John Wallace, executive director of Weld County Department of Public Health and Environment, and the Weld Department of Health and Environment, filed July 28, 2000. I'm going to defer argument on that until we address the other two motions.

The other motion is the defendant Victoria and Leroy Gallegos' motion to dismiss, and I'm going to defer that.

The first motion I want to take up is from the Court's perspective the most important motion. That is defendants Colorado Department of Human Services and Barbara McDonnell's motion to dismiss. And the Court has looked at the pleadings. I've read a lot of the cases, and what I don't understand – this is to you, Mr. Willett – what is the basis of your 1983 claim against the state officials against whom a claim is proffered? For example, I don't believe you have a claim against any entities. A 1983 claim is probably only against individuals in their individual capacities. So to the extent that there's a claim against Barbara McDonnell in her official capacity and to the extent there's a claim against Colorado Department of Human Services, I don't know if those are proper claims. Do you agree, 1983 claims?

MR. WILLETT: Well, I believe, Judge, we have sued Ms. McDonnell in both her official and individual capacity.

THE COURT: Yeah, but all I'm talking about is the extent to which you've asserted a claim against her in her official capacity, that's really not a proper 1983 claim, is it?

MR. WILLETT: I would agree with that.

THE COURT: And if there are any state entities against whom a 1983 claim is brought, those claims are improper.

MR. WILLETT: Agree with that.

THE COURT: Putting that aside here, let's deal with the claim that remains. What is the basis for asserting that there is a valid 1983 claim? As you know, a 1983 action requires that there be some cognizable deprivation of a constitutional right here. And the constitutional right I think you're asserting is based upon the Fifth and Fourteenth Amendments, due process claim, and some courts have described this as substantive due process and others have described it as just due process. But it's clear that the culpable party here, as it relates to the death of the infant,

were the Gallegos. I'm not talking about Renee and/or Charles, because it's Renee, according to the complaint allegations, which I must accept as true, that shook the infant in a way that caused serious injury and resulting in death several weeks thereafter.

But what is it about that, even accepting as true the allegations of the first amended complaint, that gives rise to a valid constitutional claim against state officials?

MR. WILLETT: Judge, initially the right, the primary right that we believe is a substantive due process right is a right to be free from harm. And I think this right, the right for children to be free from harm, this right was identified in **Yvonne vs. New Mexico** which I cited in the briefs. That's at 959 F.2d 883. Where the claim against the state officials arises is because the state and federal statutes and regulations which outline the requirements for federally subsidized child care facilities list as a primary objective that these regulations and statutes are enacted to improve the

quality of child care in federally funded programs and for the safety of the children in those programs.

These regulations and statutes, taken together, require a background investigation to occur for all licensed applicants who seek federal funding through the federally subsidized program. And that goes back to the main purpose of the statutes and regulations which is to create a – a federally subsidized child care environment in which infants, particularly newborns, can be safe.

I think the spirit and intent of those programs, which is part of this due process right, is laid out in the statutes. And that spirit and intent is that for those people, such as Ms. Ruiz, who is a single mother, who can't afford regular day care services, the federal government is saying, we want these people to be able to work, we want them to have affordable day care. Therefore, we're going to federally subsidize their day care, and we don't – we want them to be able to rely on the fact that the licensing requirements create

a safe environment for their children. And do not create a dangerous environment.

THE COURT: Well, let me ask this question. Let's assume that what you're saying is true, for purposes of this motion to dismiss hearing because I've got to accept the allegations of the complaint as true and view the evidence in a way that's most favorable to the nonmoving party, the plaintiff. But let's assume, just for purposes of my question, that state officials failed to properly check the background of the – of Renee and Charles Gallegos before these two folks were given a license, state license to operate a day care operation out of their home. Which is what they did, right?

Nonetheless, it's clear that no state actor – that is, no state representative – was actually present at the home when these events occurred, and I believe it's clear that it was Renee Gallegos who was the one who personally shook the kid and engaged in the conduct that led to this death. His

tragic death, let me say it that way because the Court believes that to be the case.

So what we're dealing with here is a situation where you're claiming that there's a substantive due process claim against the state, but the party who committed the egregious act that led to the injury was a private party and not a state official. You agree with that, don't you?

MR. WILLETT: I do agree that that was a private party. However, that private party was essentially, to use some colloquial terms, an independent contractor for the state and federal government, receiving federal funds. And there's a special connection created by the fact that most of the funds for the placement are being received by the federal government, supposedly with all the requirements of these federal and state programs in place.

So while that person is in fact a private party, in essence, they're an independent contractor for the federal

government because the federal government has created this program.

THE COURT: All right. Let's take it a step further. In the Tenth Circuit case of **Uhlrig vs. Harder,** 64 F.3d 567, decided by the Tenth Circuit in 1995, Judge Ebel writing for the court said – and this is on page 571 – that in order to prevail under substantive due process claim, plaintiffs must demonstrate that the state acted in a manner that, quote, shocks the conscience, unquote, and omitting cites here. Continuing on with the quote, moreover, as the conduct complained of in the instant case was committed by a private third party, i.e., Waddell, rather than by a state actor, plaintiff must demonstrate either, 1. the existence of a special custodial relationship between the plaintiff and the state, or, 2. that the state recklessly created the danger that caused the constitutional violation.

Then there's a reference to **Graham vs. Independent School District,** another Tenth Circuit case decided in 1984,

that I think has some legal pertinence; and then Judge Ebel goes on to note that in the case that I'm quoting from, plaintiff had relied on the danger-creation theory to meet the state action requirement; and then of course as you know from reading this case, the court ultimately concluded that there really wasn't sufficient state action such that a due process claim is assertable.

So but I think this is the test, the general test, that I've got to apply here. So tell me sort of how the facts of this case meet this test, which I think is rather stringent, to be honest with you.

MR. WILLETT: Thank you, Judge.

We believe that the special relationship is essentially created by the child's special status as one on whose behalf federal funds were directly received by Tender Heart Day Care. So in other words, whenever a child goes into one of these day care facilities that is federally funded and approved, funds are disseminated to that entity on behalf of the child by

the federal government which essentially create a special relationship between the federal government, the state government, and the child because all these regulations work together.

In terms of the danger-creation theory, Judge – and my response to this is going to be a little bit anecdotal, if the Court may allow me to do it that way. I am in a position as a lawyer to be able to afford essentially a nice Montessori school for my little children. A person who cannot afford a nice placement for their children, a single mom, for her to be able to work and contribute to society, which is the ultimate purpose here, she has to rely on federal funds and a federally funded placement. And what makes it most acute for her is that she doesn't have the time to take off six months to care for her newborn child. She's taken her newborn child, essentially this child is helpless, and any subtle physical movements of a newborn can dramatically affect that child's medical and physical condition. That's why they teach you

in the hospital to hold the child's head so gently, to make sure that the head doesn't bump into anything because it's so soft and fragile. And that's why we have the development of something called shaken baby syndrome, which is what happened here.

All that needs to happen with someone who is so fragile as a brand-new baby is for it to be shaken in a way that wouldn't injure another person. However, because of that, they suffer contusions on the inside of their brain from hitting the skull because it's flopping around in there, the child's so undeveloped, that we are proposing to the Court that the care of newborn children, as envisioned by the federally subsidized programs at issue here, is a dangerous activity.

And that's – and that if they don't make – if reasonable, easy steps are not undertaken to protect newborn children from people that are known in the public record to have a longstanding history of domestic violence, then it's

fully foreseeable that these children may suffer harm from the people who can't control their tempers and anger. So here by licensing individuals in utter disregard of regulations which require background checks, you run the risk of licensing individuals who have a known history of domestic violence and you're putting newborn children in their hands. That's danger creation, and that's what happened here.

THE COURT: Let me hear a response from the state.

MR. HAINES: Your Honor, as Your Honor has pointed out, any right that nay individual has to be free from harm applies only when there is a special relationship between the state and that individual. And that special relationship did not exist here. The cases that have found that special relationship have done so where the individual who has come to harm has actually been in the custody of the state. There was no custody in this situation, no custody by the state in this situation as there was in the case of **Yvonne vs. New Mexico Department of Human Services** that Mr.

Willett has referred to. That case said, We are convinced that these cases clearly alerted persons in the positions of defendants that children in the custody of the state had a right to be reasonably safe from harm.

THE COURT: Let me interrupt you here. I think you're probably right. I don't think that there is sufficient nexus here between Miss Gallegos and what she did to the kid and the state to satisfy the clear legal requirements of the special relationship theory.

But I am intrigued by his argument on the danger-creation theory, and I'd like you to respond to that more fully and to the sense that the day care center was federally subsidized, the individuals in question had known instances of domestic violence and/or other violence, and that when you put a newborn – when you license – give a license to someone to take care of newborns who have had a predisposition for violence and violence does occur, that

there could be support for an argument that that creates the situation where the second prong could be satisfied.

So I haven't decided what my thoughts are on that, but I want to have you respond more fully to that portion of the argument.

MR. HAINES: As I understand Mr. Willett's argument, he is suggesting that newborn babies are particularly vulnerable. Unquestionably they are, they are fragile; and it does not take much to harm them, as apparently happened in this case.

The history of violence that has been alleged is a history that includes Mrs. Gallegos – that is, Renee Gallegos – and Charles Gallegos at one time or another seeking restraining orders against each other and at one time or another seeking divorce actions against each other. Those instances do not represent violence toward newborn children. By the same token, Your Honor, if there had not been such a

history, it could not guarantee that an incident wouldn't occur with any particular infant who is so vulnerable.

Mr. Willett refers to a – the fact that the federal government subsidizes this and therefore the federal government creates some special relationship here. But the federal government is not a party in this action. It is the State of Colorado. And the federal government did not create a relationship between the child or the plaintiff here with the State of Colorado.

Moreover, even if the danger-creation theory exists, there has been no allegation here against Barbara McDonnell of personal participation. She is alleged only to be the executive director. There is no allegation in the complaint of her individual actions or personal participation; and while Mr. Willett says he sues her in her individual capacity, that is belied by the fact that the complaint and the amended complaint and the second amended complaint –

THE COURT: Which I have not allowed, by the way, the second amended complaint.

MR. HAINES: I understand. The proposed second amended complaint. Do not allege anything other than Barbara McDonnell's official actions and her official authority. There is no individual conduct that connects here with this case, and therefore there is no suit against her in her individual capacity, only a suit against her in her official capacity.

Your Honor, I have no further argument on the question that you posed to me. I do have argument to make that I think affects the subject matter jurisdiction of this court to hear part of these claims.

THE COURT: Go ahead. Make your argument, because you're the moving party.

MR. HAINES: Your Honor, in my motion to dismiss, I pointed out in a footnote that the plaintiff appears in her personal capacity, yet she asserts claims on behalf of the

deceased infant. And in response to that, Mr. Willett said that he would amend to list the plaintiff's capacity as a representative of the infant, and he has done so in the proposed second amended complaint. However, when I raised that issue, I did not raise it merely as window dressing, Your Honor. In a 1983 action we look to the law of the State of Colorado for the law pertaining to the survival of actions, and Colorado has a couple of statutes that bear on this.

And in the first place, section 13-20-1-1 (2) requires that claims, survival actions, be brought in the name of the personal representative. Section 15-12-103 requires formal appointment of a personal representative and issuance by the court of letters of appointment. And that has not occurred in this case. There has been no probate proceeding opened. I checked the docket of Weld district court this morning and find no listing of a probate action brought in the estate, much less any issuance of letters of appointment of a personal representative.

I believe that this is a standing issue that affects the subject matter jurisdiction of this court to hear any claims respecting the child. That is, the claims of the child. Assuming that the probate proceeding is opened and assuming that letters of appointment are issued, then any amendment, I believe, could not relate back to the beginning of this case because the subject matter jurisdiction of this court must apply throughout the period of the pendency of the action.

THE COURT: Well, let me ask you this, Mr. Willett. Has your client been duly appointed by the State of Colorado – stay there, counsel – has your client been duly appointed by Weld County and/or the appropriate probate judge in Weld County to represent the deceased?

MR. WILLETT: We have not initiated a – there hasn't been, as far as I know, a probate proceeding initiated. It's my understanding of the law, Judge, is that survivors of a decedent can bring an action without a formal appointment of

a probate proceeding. In the past in state court, the practice has been for, at least for me, that those actions are brought by a family member, normally a parent who can bring those; and that to the extent some judgment is eventually obtained, then that judgment has to be disbursed through probate. But there is no prerequisite for a probate – for a representative to be appointed through the probate court. And certainly counsel has cited no authority that deprives some court of subject matter jurisdiction, if that has not occurred.

I think the question of subject matter jurisdiction really comes down to the plain language and the intent of section 1983 and has nothing to do with the formality of essentially seeking an order from a probate court to administrate the funds of an estate. This two-and-a-half-week-old child had no estate. The only estate he has may or may not be represented by this case. And certainly if the Court wants us to have Ms. Ruiz appointed as the representative through probate court in Weld County so that

it can be sure that she lives up to her fiduciary obligations to the estate of her child, we will do that. But there's nothing that counsel has cited which says to the – which suggests that any court has ever held that the failure to get oneself appointed when you're the mom of a deceased – of a deceased infant – that the failure to do that deprives a court of subject matter jurisdiction. There's no case holding that.

THE COURT: I'm not going to decide this case on that issue. I want to go to whether or not there's a viable 1983 claim. I'm not going to decide it on that issue. I think that is inappropriate. If there were a viable 1983 claim or if there is and the Court found the problem with the plaintiff not being duly appointed, I would give her time to cue that because it's clear that she is the surviving parent of the deceased, and this Court always believes in substance over form, particularly in something like that. So I'm not inclined to find merit in that argument, particularly at this stage of the case.

Do you have any more you want to say about the 1983 issue?

MR. HAINES: Your Honor, only that with respect to the danger-creation theory, under a standard set out in the **Uhlrig** case, that it requires satisfaction of a "shock the conscience" standard, that hat has not been met here; that there's not a sufficient connection between the conduct of a third party and an alleged failure to deny a license; that in fact the licensure or the lack of license does not have a close enough nexus to the harm done here to satisfy the "shock the conscience" standard and permit the case to go forward under a "shock the conscience" standard. In addition to that, even if there were that nexus, there has not been a sufficient allegation of personal participation in this case to overcome Barbara McDonnell's qualified immunity.

THE COURT: All right. Mr. Willett, respond. What I want you to respond to is in looking at the first amended complaint, which is the only complaint that's before the

Court, I don't see any allegations that are directed at Barbara McDonnell or anyone else in their individual capacity who were employees of the state directed at anything that they did which was related to the specific conduct that caused the death of the infant.

So two questions. Is that in the complaint; and if it's not, how can you validly assert a 1983 claim against individual state representatives where they were not directly involved in the conduct.

And I'm going back now to the danger-creation theory because I don't think there's any merit – I'll let you make a further record – I don't think there's any merit to the special-relationship theory because there's a number of cases hat in order for that to be applied to the state, that the state through its own actions taken custody of someone, i.e. in a penal institution, or placed someone in involuntary custody in a mental institution or something like that where the state has through its own direct initiative placed a person in a position

where a special custodial relationship exists which is what the case talks about.

And then on the danger-creation theory, one of the cases talked about a situation where, for example, the police arrested – strike that – impounded someone's car at two-thirty in the morning and then left the owner of the car in a very, very dangerous neighborhood and that person then was physically assaulted. And the court held that the actions of the police in leaving this plaintiff in an area that was known to be dangerous caused sufficient – was sufficient conduct to create a triable claim on the issue of danger-creation theory.

But all of those situations have involved things where the state affirmatively did something. The other point I want to make – observation I want to make is it's clear from my reading of all the cases that you cannot assert a valid constitutional claim either under the special-relationship theory or the danger-creation theory if you're merely just talking about negligence by state officials. And it seems to

me that really what you're asserting here is that state officials were negligent when they failed to properly check the backgrounds of the Gallegos before awarding them their license to operate this facility.

And so I want to point out those concerns because I've given you a chance to address them because the result here is not a very good one in the sense of the plaintiff o course has lost her infant son; but my obligation here is to uphold the law, and I can't allow a case to go forward unless I believe there's merit to the federal claim. And I have my doubts based on what I've said.

So go ahead.

MR. WILLETT: Okay, Judge. Judge, in terms of the specifically addressing the danger-creation theory and what Barbara – and in the context of the first complaint, which is what the Court asked me to do, I guess I would just briefly note – why don't I just do that. Essentially the first complaint states that Barbara McDonnell and John Does 1

through 4 failed to conduct an adequate investigation into the background of Charles and Renee Gallegos, and in fact that was not done.

Why that – why there's an adequate nexus thee to the danger-creation theory in part has to do with what I discussed before about the vulnerability of newborns. But in the context of this case why that failure essentially does shock the conscience, does rise to a greater level than negligence is because in this area, in the human services, social services area, it is accepted fact that domestic violence is in fact a cyclical, repetitive conduct and if you do not make any effort to weed out those family home day care centers in which it is evident that there is a pattern of domestic violence there, all of the experts in this area will tell you that the likelihood of that occurring again is almost certain.

And in this particular case, the failure to do that was – is especially critical because contrary to the assertions of the attorney general, the background information here on Charles

and Renee Gallegos would not only show a history of assaultive behavior, but the court documents and the facts, as we believe they're going to be shown, would indicate that both parties felt that their own children were at risk. And that is demonstrated in part by the response that we filed to Charles and Victoria Gallegos's motion to dismiss where we attached some of those court documents which show that because of the conflict between the parents, Charles and Victoria, were required to do the pick-up and drop-offs of the kids. And in fact, in some of those court documents, Renee Gallegos said, well, I fear for the safety of my child. And I understand that our facts would also show, based upon some statements against interest made by Charles Gallegos, Sr., that he is fact, knew that his daughter-in-law shook his own grandchildren in a rageful manner and that he has made statements to that effect.

So when you're talking about eh responsibility of state officials here, you're talking about it in the context of a

body of literature which comprises social work in which the incidence of domestic violence in the home, if you can see that there's a pattern, is bound to repeat. And where you have allegations against Barbara McDonnell in her individual capacity is because she is charged with compliance with the state regulations which require a prelicense background check to occur. She's charged with the duty to make sure that her entity, of which she's the director, The Colorado Department of Human Services, has the responsibility to comply with these regulations; and in fact that was not done in this case and, as we did allege subsequently, we are able to now obtain facts to show that that was in fact a practice and custom of the department.

And the basis for my claim there, Judge, is that essentially there has been extensive reporting through the *Denver Post* and other local, reputable periodicals that report self-audits by the Colorado Department of Human Services, their own auditing, shows that the investigations into foster

care and child placement facilities, whatever they were – and it's our contention that they weren't occurring – failed to catch the fact that many, many, many people receiving federal funds and operating child care facilities had extensive criminal histories; and this was a pattern within the department for which she's responsible individually as its executive director and for which, whoever it was that she asked to discharge these obligations underneath her, failed to do and those are John Does 1 through 4, and obviously we can't – we've looked through the department's file on Tender Hearth Day Care, and there's nothing there. But certainly she's responsible fore the policy and practice of her department which was to fail to investigate the criminal backgrounds of people caring for our children, our impoverished families' children in this state.

THE COURT: All right. Let me just note just so the record's clear, that the Tenth Circuit cases, and again I'm focusing primarily on this **Uhlrig vs. Harder**, 64 F.3d 567,

because I think it lays out the test, speaks to the law hat has existed since the U.S. Supreme Court's decision, **DeShaney vs. Winnebago County Department of Social Services** that was decided in 1989 as found at 489 U.S. 189.

In **DeShaney**, the Wisconsin Department of Social Services received several reports that a four-year-old boy, Joshua, was suffering abuse at the hands of his father. Despite these reports, the state failed to remove Joshua from his father's custody. Eventually Joshua's father struck him so severely that the boy suffered permanent brain damage. Joshua and his mother brought suit alleging the state had violated the Fourteenth Amendment by failing to intervene on his behalf. The Supreme Court held that nothing in the language of the due process clause itself requires the state to protect the life, liberty, and property of its citizens against invasion by private actors, so the Supreme Court rejected plaintiff's argument.

However, the court in **DeShaney** fashioned a narrow exception to this general rule holding the duty of protection may arise when the state imposes limitations upon an individual to act on his or her own behalf. The court noted, quote, It is the stat's affirmative act of restraining the individual's freedom to act on his own behalf, through incarceration, institutionalization, or other similar restraint of personal liberty, which is the deprivation of liberty triggering the protections of the due process clause, not its failure to act to protect an individual's liberty interests against harms of other inflictive means. Accordingly, if a state takes a person into its custody and holds him there against his will, it also assumes some measure of constitutionally mandated duty of protection.

Now, it's clear in this case, as I noted, that there's no suggestion here that there's been any institutionalization or any incarceration or any custody that was initiated by the state that would trigger the special custodial relationship

doctrine which is the one prong of how state action can be demonstrated for purposes of a viable 1983 claim where there is an assertion that the instant act or instant conduct in the – in the case was committed by private third party rather than by state actor. And it's clear, and the Court makes a finding, that to the extent the complaint alleges that Renee Gallegos was the one who shock the minor child so severely that it ultimately led to his death, that she was at that time not acting as a state actor. And even though her day care center may have received state and/or federal funds, I don't think that that rises to the level of her being a state actor.

So it's clear to the Court that the claim does not set forth – the complaint, excuse me, does not set forth a valid claim to the extent that it seeks to recover against the state representatives in their individual capacities based on a special custodial relationship between the plaintiff who represents her deceased son and the state.

Then the second prong is that the state recklessly created the danger that caused the constitutional vilation. Now, for the state to be liable under section 1983 for creating a special danger – that is, where a third party other than a state actor caused the complained-of-injury – a plaintiff must allege a constitutionally cognizable danger, that is, the danger-creation theory must ultimately rest on the specifics of a substantive due process claim, a claim predicated on reckless or intentional injury causing state action which, quote, shocks the conscience, unquote. It's the burden of the plaintiff to demonstrate that the defendants acted with the reckless degree of culpability or in a conscience-shocking manner.

Now, in the **Uhlrig vs. Harder** case, Judge Ebel talked about what the "shock the conscience" standard is, and it's a pretty substantial test. I'm not going to read what the case says, but let me just note that one of the things ti means is that the standard for judging a substantive due process

claim is whether the challenged government action would, quote, shock the conscience of federal judges.

In this case, regrettably, I don't find that the conduct here by the state shocks my conscience. It's a situation where at best the state was negligent for failing to conduct further background checks, but it's clear that the state really had no direct responsibility for the conduct of Renee and/or Charles Gallegos. So I don't see any scenario under which plaintiff has alleged sufficient facts, even accepting as true all the allegations of the first amended complaint, that this conduct rises to the level of shocking the conscience as it relates to the conduct of the state officials.

Go ahead.

MR. WILLETT: If I may, Judge, the Court essentially talked about **DeShaney**. And I think that **DeShaney** does actually provide the plaintiff here with a window that does not necessarily include the "shock the conscience" standard. And what I draw the Court's attention

to is footnote 9 of the **DeShaney** opinion. Which appears at – I don't know if th› Court has the Supreme Court –

THE COURT: Well, I've got footnote 9.

MR. WILLETT: Okay.

THE COURT: Let me read it. Hold on.

MR. WILLETT: Okay. Sure.

THE COURT: Well, the analogy that's noted in footnote 9, it says what it says. But the court at the end says, We express no view on the validity of this analogy, however, because it's not before us in the present case.

And I believe that there is a distinction between placing kids in foster homes where there's a clear acknowledgment that perhaps the foster parents have a past history of abuse to kids and granting a license to someone who has been involved in numerous domestic abuse situations with a spouse without any prior history that there has been a violent incident or injury situation as it relates to a third-party newborn, which is really what you're saying.

So I mean I, understand what you're saying about this footnote, but eh problem is that there is Tenth Circuit law directly on point that I think dooms this case. And I am not the appellate court. And I don't believe that it would be appropriate for me to expand the parameters of the Tenth Circuit discussion on this point. And I just believe that this **Uhlrig** case **vs. Harder** as well as some other Tenth Circuit cases, including **Radecki vs. Barela**, 146 F.3e 1227 as well as the **Graham** case, which I alluded to earlier, here it is, **Graham vs. Independent School District No. 189**, 22 F.3d 991. All these cases, I think, set a very, very restrictive test here. And I think that my hands are tied. I suppose no judge should use that as an excuse, but I'm not. It seems to me that for me to carve out an exception here on these facts would fly directly into these clear and unambiguous holdings. I just can't do that.

So I would invite plaintiff, if plaintiff believes that there is a basis for a claim here, to consider appealing this

case; and the appellate court needs to determine the facts of this case would suggest that there's some basis for a danger-creation theory to exist, which I think is the better of your two arguments. I clearly find no basis for the special custodial relationship theory, and I think under the existing case precedent, the danger-creation theory just does not apply. So I'm going to grant the state defendants' motion to dismiss, and I'm going to dismiss the claims against them.

Since I'm going to dismiss the state – the 1983 claim, I'm not going to exercise supplemental jurisdiction over the claims against Victoria and Leroy Gallegos, but I sill exercise supplemental jurisdiction as it relates to the default judgment matter against Renee Gallegos 'case I think that's in the best interest of justice, so that will stay here until the Court enters its final order. But then the rest of the cast I'm going to dismiss without prejudice as it relates to the parents.

Okay.

Is there anything else we need to do today? I'll do an order on all this. So just for the record here, let me say what my rulings are and then I'll follow it up with a written order that spells it out in more detail. I'm going to grant the defendants Colorado Department of Human Services and Barbara McDonnell's motion to dismiss for the reasons noted by me. I'm going to dismiss the claims against the state entities.

I'm going to deny as moot defendants' Victoria and Leroy Gallegos's motion to dismiss because the Court is electing not to – let me back up. I'm going to grant those claims but on a different ground. I'm going to grant Victoria and Leroy Gallegos's motion to dismiss merely because the Court is electing not to exercise supplemental jurisdiction over those claims. So those claims will be dismissed without prejudice. I'm not going to address them on the merit; and I'm going to deny then as moot plaintiff's renewed motion to add Dr. John Wallace, executive director of the Weld County

Department of Health and Environment, because even if I were to allow the second amended complaint, I would find that to be a futile act because there's nothing in that complaint that would change the Court's analysis of how the existing law and legal precedent applies to the facts. So it would not serve a useful purpose.

Is there anything else from either side?

MR. GROOM: No, Your Honor.

THE COURT: All right. We'll be in recess.

(Recess at 3:07 p.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 27th day of October, 2000.

Kara Spitler

Case Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROSE RUIZ,

Petitioner,

v.

BARBARA McDonnell,
Executive Director of the Colorado Department of Human Services, COLORADO DEPARTMENT OF HUMAN SERVICES, WALTER SPECKMAN, Executive Director of the Weld County Department of Human Services, THE WELD COUNTY DEPARTMENT OF HUMAN SERVICES, RENEE L. and CHARLES GALLEGOS, VICTORIA and LEROY GALLEGOS, and JOHN DOES numbers one through four,

Respondents.

Certiorari from the U.S. Court of Appeals for the Tenth Circuit
Case Number 01-1010

APPENDIX "B" OPINION OF THE TENTH CIRUIT COURT OF APPEALS

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROSE RUIZ, Plaintiff – Appellant, v. BARBARA MCDONNELL, Executive Director of the Colorado Department of Human Services; COLORADO DEPARTMENT OF HUMAN SERVICES; RENEEE L. GALLEGOS; CHARLES GALLEGOS; VICTORIA GALLEGOS; LEROY GALLEGOS, and John Does numbers one through four, Defendants-Appellees.	No. 01-1010

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 00-D-951)

Jonathan S. Willett of Willett & Mestas, LLC, Denver, Colorado, appearing for Plaintiff-Appellant.

Friedrick C. Haines, Assistant Attorney General, Denver, Colorado, for Defendants-Appellees Barbara McDonnell and Colorado Department of Human Services, (Ken Salazar, Attorney General, Denver, Colorado for Defendants-Appellees Barbara McDonnell and Colorado Department of Human Services, and John Barry, Patrick M. Groom, and Timothy V. Clancy of Witwer, Oldenburrg, Barry & Bedingfield, LLP, Greeley, Colorado, for Defendants-Appellees Victoria Gallegos, and Leroy Gallegos, with him on the brief).

Before **HENRY**, Circuit Judge, **HOLLOWAY**, Senior Circuit Judge, and **VANBEBBER**, Senior District Judge.*

VANBEBBER, Senior District Judge.

Plaintiff-Appellant, Rose Ruiz, filed this action alleging violations of her and her deceased son's Fourteenth Amendment substantive due process rights under 42 U.S.C. § 1983 against Defendant's Appellees Colorado Department of Human Services ("CDHS") and Barbara McDonnell, Executive Director of CDHS (collectively referred to as the "State Defendants"), and John Does numbers one through four. Ms. Ruiz also brought ancillary state law tort and

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* The Honorable G. Thomas VanBebber, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

contract claims against Defendants-Appellees Renee Gallegos, Charles Gallegos, Victoria Gallegos and Leroy Gallegos (collectively referred to as the "Private Defendants"). The State Defendants moved to dismiss Ms. Ruiz's claims against them pursuant to Fed. R. Civ. P. 12(b)(6) and, declining to exercise supplemental jurisdiction over Ms. Ruiz's remaining state law claims, dismissed without prejudice all Defendants except Renee Gallegos. The district court subsequently entered default judgment against Renee Gallegos pursuant to Fed. R. Civ. P. 55. Ms. Ruiz appeals the district court's order granting the State Defendants' motion to dismiss. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and Affirm.

I. BACKGROUND

Ms. Ruiz relies on the following facts alleged in her first amended complaint and proposed second amended

complaint.[2] In August 1998, Ms. Ruiz, a single working mother receiving federal assistance to cover day care expenses, began taking her infant son, J.R., to the Tender Hearth Day Care ("Tender Heart") in Greeley, Colorado. Tender Heart was a private, licensed day care service operated by Renee Gallegos in the home that she shared with her husband, Charles Gallegos, and which was owned by Charles Gallegos's parents, Leroy and Victoria Gallegos. On October 17, 1998, J.R. suffered severe head injuries

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[2] When it granted the State Defendants' motion to dismiss, the district court denied as moot a motion for leave to file a second amended complaint that Ms. Ruiz submitted several months prior to the district court's decision. The proposed second amended complaint sought to: (1) add as defendants the Weld County Department of Public Health and Environment ("WCDPHE") and Dr. John Wallace, Executive Director of WCDPHE; (2) add allegations that it was a practice and custom of the CDHS and the WCDPHE not to investigate child care license applicants and holders; and (3) supplement a premises liability claim against Charles, Victoria and Leroy Gallegos. Ms. Ruiz contends that the district court should have considered the proposed second amended complaint's allegations before it granted the State Defendants' motion to dismiss, and she urges us to consider those allegations on appeal. She has not complied with Fed. R. App. P. 24(a)(5). The statement of the issues presented for review in Ms. Ruiz's opening brief does not specifically raise the district court's denial of the motion seeking leave to file the second amended complaint as an issue. Nevertheless, the issue is discussed elsewhere in Ms. Ruiz's opening brief. As a result, we have considered the proposed second amended complaint's allegations for purposes of thoroughly reviewing Ms. Ruiz's claims on appeal, but we conclude that the proposed amendments do not affect our decision in this case.

consistent with violent shaking while in the care of Tender Heart. J.R. died from his injuries on November 10, 1998. Renee Gallegos later pleaded guilty to felony child abuse charges in connection with J.R.'s death and is now imprisoned for that crime.

Tender Heart, which received federal funding for its services, was licensed as a "Family Child Care Home" by the CDHS, whose Executive Director at the relevant time as Ms. McDonnell. As part of its licensing process, the CDHS was required to conduct an investigation into Renee and Charles Gallegos's fitness as child care provides and to verify that Tender Heart carried valid public liability insurance. Ms. Ruiz alleges in her amended and proposed second amended complaints that the CDHS failed in both regards by neglecting to uncover an extensive history of domestic violence between Renee and Charles Gallegos that Ms. Ruiz contends was available through a simple search of court records, and by failing to discover that Tender Heart did not

carry the proper insurance. Ms. Ruiz alleges in her proposed second amended complaint that it was a practice and custom of the agents of the CDHS to neglect conducting the requisite background and insurance checks, and that Ms. McDonnell failed to stop or correct that practice. Both the amended and proposed second amended complaints allege that the Gallegoses' history of domestic violence and Tender Heart's lack of valid public liability insurance were grounds upon which the CDHS should have denied licensing to Tender Heart.

On May 8, 2000, Ms. Ruiz commenced this suit against the State Defendants, the Private Defendants, the Weld County Department of Human Services and its Executive Director, Walter Speckman (collectively referred to as the "County Defendants"), and John Does numbers one through four, all of whom were alleged to be unknown

employees of the State and County Defendants.[3] Ms. Ruiz based her § 1983 claim on the failure to deny a family child care home license to Tender Heart. Specifically, Ms. Ruiz alleged that the state and federal statutes and regulations governing child care licensing "embody a substantive constitutional right to be free from the deprivation of life and liberty without due process of law under the Fourteenth Amendment of the United States Constitution" and that the licensure of Tender Heart after an inadequate, or nonexistent, investigation into the facility ultimately deprived her and J.R. of those rights.

On June 23, 2000, the State Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6),

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[3] Ms. Ruiz later substituted the WCDPHE and Dr. Wallace, its Executive Director, as the named County Defendants, and added Cheryl Estrich, an employee of the CDHS, as an additional State Defendant. The County Defendants and Ms. Estrich were either dismissed by the district court or not served with process. They are not parties to this appeal. John Does numbers one through four remain unknown and unserved. Despite this, we not that Ms. Ruiz's § 1983 allegations against these Defendants were in all relevant respects identical to the allegations against the State Defendants. Thus, although the balance of this opinion refers only to Ms. Ruiz's allegations against the State Defendants, the allegations applied equally to these other Defendants as well.

arguing that: (1) the CDHS was entitled to immunity under the Eleventh Amendment to the United Stated Constitution; (2) neither the CDHS nor Ms. McDonnell, acting in her official capacity, were "persons" within the meaning of § 1983; (3) Ms. McDonnell, acting in her individual capacity, was entitled to qualified immunity; and (4) Ms. Ruiz failed to allege a constitutional violation by the State Defendants because she could not state facts sufficient to satisfy either the "special relationship" or "danger creation" exceptions to the general rule that state actors are not liable for the violence of private individuals under the Fourteenth Amendment's Due Process Clause.

Ms. Ruiz conceded in her response to the motion to dismiss and at an October 19, 2000, hearing on the motion that her claims against the CDHS and Ms. McDonnell, acting in her official capacity, were improper under § 1983. On December 4, 2000, the district court entered an order dismissing Ms. Ruiz's § 1983 claim against the State

Defendants pursuant to Fed. R. Civ. P. 12(b)(6) based on the State Defendants' argument that Ms. Ruiz failed to allege facts sufficient to satisfy either exception to the general rule that state actors cannot be held liable for the violence of private individuals under the Due Process Clause. Having disposed of the only claim over which the district court had original jurisdiction, the court declined to exercise supplemental jurisdiction over Ms. Ruiz's remaining state law claims. As a result, the district court dismissed all Defendants from the case except for Renee Gallegos, against whom the court entered default judgment on March 21, 2001.

Ms. Ruiz now appeals the district court's order of December 4, 2000, arguing that the district court erred when it concluded the Ms. Ruiz's amended complaint failed to sufficiently allege a "danger creation" cause of action under § 1983.

II. DISCUSSION

A. Appellate Jurisdiction

As an initial matter, Defendants-Appellees argue that we lack jurisdiction over this appeal because Ms. Ruiz allegedly failed to properly file her notice of appeal with the district court. Specifically, Defendants-Appellees contend that Ms. Ruiz's notice of appeal was premature because the district court had not yet adjudicated all claims against all Defendants when Ms. Ruiz filed the notice. According to Defendants-Appellees, Ms. Ruiz should have filed a second, timely notice of appeal after the district court entered final judgment. We disagree.

We directly addressed and rejected the same argument as made by Defendants-Appellees in Lewis v. B.F. Goodrich Co., 850 F.2d 641 (10th Cir. 1988) (en banc). In Lewis, we held that a notice of appeal filed before the district court disposes of all claims in nevertheless effective if the appellant obtains either certification pursuant to Fed. R. Civ. P. 54(b) or final adjudication before the court of appeals considers the case on its merits. 850 F.2d at 645-46. In such

a situation, the premature notice simply ripens on the date of certification or final adjudication, and the filing of a second notice of appeal is unnecessary. Id. at 645.

Here, the district court issued an order on December 4, 2000, dismissing without prejudice all Defendants except for Renee Gallegos. Ms. Ruiz filed her notice of appeal on January 5, 2001. Because the district court had not yet adjudicated all claims against all Defendants, we ordered counsel for Ms. Ruiz to serve and file with us either a district court order granting certification or a district court order explicitly adjudicating the remaining claim against Renee Gallegos. The district court entered default judgment against Renee Gallegos on March 21, 2001, and Ms. Ruiz's counsel provided us with the district court's order to that effect on March 28, 2001. Ms. Ruiz's notice of appeal, filed on January 5, 2001, ripened on March 21, 2001, with the district court's entry of default judgment against Renee Gallegos. Ms. Ruiz was not required to file a second notice of appeal.

As a result, we conclude that we have appellate jurisdiction in this case pursuant to 28 U.S.C. § 1291.

B. Eleventh Amendment Immunity

Defendants-Appellees next argue that the CDHS and Ms. McDonnelle, to the extent that a claim has been asserted against her in her "official capacity," are entitled to Eleventh Amendment immunity. Although the State Defendants raised this argument in their motion to dismiss, the district court declined to address it. Because an assertion of Eleventh Amendment immunity concerns the subject matter jurisdiction of the district court, we address that issue before turning to the merits of the case. Thompson v. Colorado, 278 F.3d 1020, 1023-24 (10th Cir. 2001) (citations omitted).

The State Defendants raised the Eleventh Amendment immunity defense pursuant to Fed. R. Civ. P. 12(b)(1). Rule 12(b)(1) motions generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual

facts upon which subject matter jurisdiction is based. Holt v. United States, 46 F.3d 1000, 1002-03 (10th Cir. 1995) (citation omitted). Here, the State Defendants' Rule 12(b)(1) motion constituted a facial attack on the allegations of subject matter jurisdiction contained in Ms. Ruiz's amended complaint. Accordingly, we presume all of the allegations contained in the amended complaint to be true. Id. at 1002 (citation omitted).

With certain limited exceptions, the Eleventh Amendment prohibits a citizen from filing suit against a state in federal court. Sutton v. Utah State Sch. For the Deaf & Blind, 173 F.3d 1226, 1231-32 (10th Cir. 1999) (citation omitted). To assert Eleventh Amendment immunity, a defendant must qualify as a state or an "arm" of a state. Id. at 1232 (citation omitted). Here, there exists no dispute between the parties that the CDHS qualifies as an "arm" of the state of Colorado. Ruiz alleges in her amended complaints that "[t]he Colorado State Department of Human

Services is a part of the Colorado State Government responsible for administration of Federal programs to provide family and child care services to the needy."

In addition, to the extent that a claim has been asserted against Ms. McDonnell in her "official capacity," she may also assert Eleventh Amendment immunity as an "arm" of the state in that she assumes the identity of the CDHS. Hafer v. Melo, 502 U.S. 21, 25 (1991) (citations omitted) (explaining that a state official sued in his or her "official capacity" is generally entitled to assert the same immunities as the governmental entity for which he or she works). We recognize, of course, that a state official like Ms. McDonnell might not be protected by Eleventh Amendment immunity in a case where the plaintiff seeks prospective injunctive relief as a remedy. Thompson, 278 F.3d at 1024 (citing Seminole Tribe v. Florida, 517 U.S. 44, 73 (1996), and *Ex parte* Young, 209 U.S. 123, 159-60 (1908). Because

Ms. Ruiz seeks no such relief in this case, the exception does not apply.

We have recognized two primary circumstances in which a citizen may sue a state without offending Eleventh Amendment immunity. Congress may abrogate a state's Eleventh Amendment immunity. Thompson, 278 F.3d at 1025 (citing Seminole Tribe, 517 U.S. at 55). A state may also waive its Eleventh Amendment immunity and consent to be sued. Id. at 1024 (citing Idaho v. Coeur d'Alene, 521 U.S. 261, 267 (1997)). Neither exception applies in this case.

First, the United States Supreme Court has previously held that Congress did not abrogate states' Eleventh Amendment immunity when it enacted 42 U.S.C. § 1983. Quern v. Jordan, 440 U.S. 332, 345 (1979) (citation omitted). Second, Ruiz neither alleges in her amended complaint, nor is there any other indication in the record, that the state of Colorado waived its Eleventh Amendment immunity in this case. For those reasons, we conclude that the district court

lacked subject matter jurisdiction over Ms. Ruiz's § 1983 claim with respect to the CDHS and Ms. McDonnell, acting in her "official capacity." Accordingly, we affirm the district court's dismissal of those parties on that ground.

C. Section 1983 Claim

Finally, Defendants-Appellees argue that: (1) Ms. Ruiz's § 1983 claim is barred with respect to the CDHS and Ms. McDonnell, acting in her "official capacity," because neither qualifies as a "person" within the meaning of § 1983; and 2) Ms. Ruiz's amended complaints fail to properly allege a "danger creation" cause of action against the State Defendants under § 1983. The State Defendants advanced both arguments in their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

We review *de novo* the district court's dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Stidham v. Peace Officer Standards & Training, 265 F.3d 1144, 1149 (10th Cir. 2001)

(citation omitted). A Rule 12(b)(6) motion to dismiss may be granted only if it appears beyond a doubt that the plaintiff is unable to prove any set of facts entitling her to relief under her theory of recovery. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "All well-leaded facts, as distinguished from conclusory allegations, must be taken as true." Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984) (citation omitted). The court must view all reasonable inferences in favor of the plaintiff, and the pleadings must be liberally construed. Id. (citation omitted). The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support her claims. Scheuer v. Rhodes, 410 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982).[4]

[4] We note Ms. Ruiz's argument that our recent decision in Currier v. Doran, 242 F.3d 905, 916-17 (10th Cir. 2001), rejects the application of a heightened pleading standard to § 1983 cases in which qualified immunity is raised as a defense. Although the district court did not reach the issue of qualified immunity in its decision, and we see no evidence that it applied a heightened pleading standard in evaluating Ms.

1. "Persons" Under § 1983

In Will v. Michigan Department of State Police, the United States Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." 491 U.S. 58, 71 (1989). Although the district court declined to address the State Defendants' argument that the CDHS and Ms. McDonnell, acting in her "official capacity," did not qualify as "persons" under § 1983, "we may affirm on any grounds supported by the record." Duncan v. Gunter, 15 F.3d 989, 991 (10th Cir. 1994) (citation omitted). Because the Supreme Court's precedent in Will mandates that we conclude that neither the CDHS nor Ms. McDonnell, acting in her "official capacity," qualify as "persons" under § 1983, we affirm the district court's dismissal of those parties on that ground.

2. "Danger Creation" Cause of Action Under § 1983

Ruiz's claim, we agree that a heightened standard is not appropriate here. We therefore apply the traditional Rule 12(b)(6) standards enunciated above in our *de novo* review of Ms. Ruiz's claim.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV §1. Section 1983, in turn, permits an individual to pursue an action against any person who "under color of any statute, ordinance, regulation, custom, or usage," deprives the plaintiff of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Here, Ms. Ruiz contends that the acts and omissions of the State Defendants in licensing Tender Heart as a family child care home violated constitutional protections of substantive due process when Ms. Ruiz's son, J.R., was injured and ultimately died at the hands of Renee Gallegos.

Generally, state actors may only be held liable under § 1983 for their own acts, and not for the violent acts of third parties. DeShaney v. Winnegago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989) ("As a general matter, then,

we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."). We have recognized two exceptions to this general rule: (1) the "special relationship" exception; and (2) the "danger creation" exception. Armijo v. Wagon Mount Pub. Schs., 159 F.3d 1253, 1260 (10th Cir. 1998) (quoting Liebson v. New Mexico Corr. Dep't, 73 F.3d 274, 276 (10th Cir. 1996)). Under the "special relationship" exception, liability may attach to a state actor for the violence of a third party if the state restrained the plaintiff's personal liberty and that restraint hindered the plaintiff's freedom to act to protect himself from the third party. Id. at 1261. Under the "danger creation" exception, a state actor may be held liable for the violent acts of a third party if the state actor "created the danger" that caused the harm. Id. at 1262 (citation omitted). The district court in this case analyzed Ms. Ruiz's claim under both exceptions and concluded that

Ms. Ruiz failed to state a claim under either. Ms. Ruiz now contends under the "danger creation" exception.[5]

To state a prima facie case under the "danger creation" exception, a plaintiff must show that: (1) the charged state actors created the danger or increased the plaintiff's vulnerability to the danger in some way; (2) the plaintiff was a member of a limited and specifically definable group; (3) the defendants' conduct put the plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) the defendants acted recklessly in conscious disregard of that risk; and (6) the conduct, when viewed in total, shocks the conscience. Armijo, 159 F.3d at 1262-63 (citations omitted). Further, "[t]his state-created danger doctrine 'necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger.'" Graham v. Indep. Sch. Dist. No. I-89,

[5]Because Ms. Ruiz does not argue that the district court erred by concluding that she failed to state a claim under the "special relationship" exception, we deem that issue waived on appeal. See Veile v. Martinson, 258 F.3d 1180, 1183 n.2 (10th Cir. 2001) (citing State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 984 n.7 (10th Cir. 1994)).

22 F.3d 991, 995 (10th Cir. 1994) (citation omitted). Because we find that Ms. Ruiz failed to allege either any pertinent affirmative conduct on the part of the State Defendants or any conduct that "shocks the conscience," we conclude that the district court properly dismissed Ms. Ruiz's § 1983 claim pursuant to Fe. R. Civ. P. 12(b)(6).

First, Ms. Ruiz has alleged no facts in her amended or proposed second amended complaints that demonstrate affirmative conduct on the part of the State Defendants that created or increased the danger to J.R. Affirmative conduct for purposes of § 1983 should typically involve conduct that imposes an immediate threat of harm, which by its nature has a limited range and duration. Id. (quoting Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 733 n.4(8th Cir. D1993) (holding that a school district's enrollment of an aggressive student in public school does not constitute the requisite affirmative conduct necessary to maintain a § 1983 claim for injuries inflicted by the student because the risk posed by mere

enrollment is indefinite). Moreover, the conduct should be directed at a discrete plaintiff rather than at the public at large. Mark v. Borough of Hatboro, 51 F.3d 1137, 1153 (3rd Cir. 1995) (holding that the plaintiff, whose home was deliberately burned by a volunteer firefighter, could not maintain a § 1983 claim on the sole basis that the fire department failed to properly screen firefighter applicants because the department's conduct affected the public at large and was not directed at the plaintiff).

Here, the crux of Ms. Ruiz's claim is that J.R. suffered injuries of constitutional proportions because the State Defendants improperly licensed Tender Heart after failing to conduct an investigation into the facility. However, we do not view the mere licensure of Tender Heart as constituting the requisite affirmative conduct necessary to state a viable § 1983 claim. Specifically, the improper licensure did not impose an immediate threat of harm. Rather, it presented a threat of an indefinite range and

duration. Moreover, the licensure affected the public at large; it was not aimed at J.R. or Ms. Ruiz directly. Unlike the direct placement of a child into an abusive home, the mere licensure of Tender Heart was not an act directed at J.R. which, in and of itself, placed J.R. in danger. For those reasons, we conclude that Ms. Ruiz has failed to allege any affirmative conduct on the part of the State Defendants that created or increased the danger to J.R.

Second, even if we were to hold that Ms. Ruiz had alleged affirmative conduct on the part of the State Defendants, we cannot conclude that the conduct alleged "shocks the conscience." As noted, the ultimate standard for evaluating a substantive due process claim is whether the challenged government action "shocks the conscience" of federal judges.[6] Uhlrig v. Harder, 64 F.3d 567, 573 (10th Cir.

[6] Ms. Ruiz contends that we should look to whether the State Defendants' conduct "shocks the conscience" of parents, as opposed to federal judges. Unfortunately, Ms. Ruiz provides us with no authority that would allow us to deviate from the standard that the conduct must "shock the conscience" of federal judges, and given the clear dictate

1995) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992)). To assist us in that determination, we look to the following three factors: (1) the need for restraint in defining the scope of substantive due process claims; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policymaking bodies in making decisions impacting public safety. Id. (citations omitted). "These factors counsel that application of danger creation as a basis for § 1983 claims is reserved for exceptional circumstances." Eckert v. Town of Silverthorne, No. 00-1030, 2001 WL 1152781, at **8 (10th Cir. July 9, 2001). We have noted that ordinary negligence does not shock the conscience, DeAnzona v. City & County of Denver, 222 F.3d 1229, 1236 (10th Cir. 2000) (citing DeShaney, 489 U.S. at 202)), and that even permitting unreasonable risks to continue is not necessarily conscience shocking, Uhlrig, 64 F.3d at 574 (citing Collins, 503 U.S. at 128). Rather, a

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already outlined by this court in previous cases, we will not depart from that standard here.

plaintiff "must demonstrate a degree of outrageousness and magnitude of potential or actual harm that is truly conscience shocking." Id.

While we deeply sympathize with Ms. Ruiz in the tragic death of her son, we cannot conclude that the State Defendants' conduct in this case was so "egregious, outrageous or fraught with unreasonable risk" as to "shock the conscience." See Liebson, 73 F.3d at 277. Taking all of Ms. Ruiz's allegations as true, as we must, we do not believe that the State Defendants' failure to conduct the requisite background and insurance checks rises above the level of negligence. Because negligent acts are insufficient to sustain a substantive due process claim under § 1983, we conclude that the district court properly granted the State Defendants' motion to dismiss.

In reaching this conclusion, we have considered Ms. Ruiz's argument that we should find the State Defendants' conduct "conscience shocking" because, according to Ms.

Ruiz: (1) "there is no remedy in state tort law [] for this incident as Tender Heart Day Care satisfied the public insurance requirement with a homeowner ['s policy that did not offer cover[age] for any operation of the day care business;" and (2) the State Defendants' alleged practice of not conducting background and insurance checks is not entitled to judicial deference. We are not persuaded that either of these factors tips the balance in favor of finding the State Defendants' conduct "conscience shocking." First, we note that Tender Heart's failure to carry the proper public liability insurance has no bearing on Ms. Ruiz's ability to file suit against any of the Defendants under state tort law. At most, the Private Defendants' failure to carry the proper insurance affects only the question of who would ultimately be responsible for paying any judgment that Ms. Ruiz might obtain against the Private Defendants.[7] Second, although we

[7] Although not argued by Ms. Ruiz on appeal, we recognize that the Colorado Governmental Immunity Act might pose an impediment to Ms. Ruiz pursing a claim against the State Defendants under state tort law. See Colo. Rev. Stat. § 24-10-106 (providing immunity in most

agree that the State Defendants' conduct in this case if true, is not necessarily entitled to judicial deference, we still cannot conclude that the conduct "shocks the conscience."

We have also considered Ms. Ruiz's reliance on Currier v. Doran, 242 F.3d 905 (10th Cir. 2001), to support her argument that the State Defendants' conduct "shocks the conscience." We believe, however, that the facts of Currier are distinguishable from the facts of this case. In Currier, the state granted physical, and eventually legal, custody of two young children to the children's father. 242 F.3d at 909-10. Prior to the state granting physical custody to the father, a state social work assigned to the case became aware of the father's history of financial irresponsibility with respect to

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cases to "public entities" for "claims for injury which lie in tort or could lie in tort"). Ms. Ruiz would not be barred from pursuing such a claim, however, if she could satisfy any of the six exceptions to the governmental immunity doctrine, Id. § 24-10-106(1)(a)-(f), or if she could show that any of the State Defendants' empolyees' acts or omissions in causing her or J.R.'s injuries were "willful or wanton," Id. § 24-10-118. Ms. Ruiz chose not to pursue those options in this case. In fact, Ms. Ruiz's counsel specifically admitted at oral argument that, "In terms of accountability, it was Plaintiff's primary desire to, because she felt betrayed by the state licensing scheme, to proceed under the federal civil rights statute." Thus, we cannot conclude that Ms. Ruiz has no remedy under state tort law against the State Defendants.

the children, including making only eight child support payments I the previous three years. Id. at 909. Despite this knowledge, the social worker said nothing to the Children's Court during the hearing at which physical custody was awarded to the father. Id. Later, but prior to the father gaining legal custody of the children, the same social worker noticed bruises on the children on at least two occasions while the children were in the physical custody of the father, and was informed on at least three other occasions that the children's father and/or the father's girlfriend were allegedly abusing the children. Id. at 909-10, 919. Despite these indications of abuse, the social worker failed to launch any investigation and ultimately, through either his affirmative recommendation or his silence with respect to the indications of abuse, was responsible for the father obtaining legal custody of the children. Id. The father later killed one of the children by scalding him with boiling water. Id. at 910. Representatives of the children filed suit under § 1983,

alleging that the social worker violated the children's Fourteenth Amendment substantive due process rights by creating the danger of the harm suffered by the children. Id. at 908, 919-20. We held that the plaintiffs had alleged facts sufficient to show that the social worker's conduct "shocked the conscience." Id. at 920.

Ms. Ruiz now urges us to construe our holding in Currier to mean that "a state actor's failure to adequately investigate a child's private placement by authorizing placement with a person who ultimately harmed the child is actionable and satisfies the shocks the conscience standard." We disagree. Our holding in Currier is simply not that far-reaching. The conduct by the social worker in Currier, given the father's history of financial irresponsibility with respect to the children and the numerous specific indications of abuse of the children by the father and/or his girlfriend, was of a different degree and type of culpability than the State Defendants' alleged failure to conduct background and

insurance checks on the family child care home license applicants in this case. The conduct of the State Defendants in this case did not involve the direct placement of a child in the hands of an abuser; it merely involved the licensure of a facility. While we find that the State Defendants' actions might have risen to the level of negligence, we do not consider them to be "conscience-shocking."

Defendants-Appellees do not request that we consider the State Defendants' qualified immunity argument on appeal, and because we have already conducted that Ms. Ruiz's § 1983 claim fails to assert a violation of federal constitutional law, we agree that we need not do so. See id. at 917 (citations omitted) (stating that before the court examines whether a defendant is entitled to qualified immunity, it must first determine whether the plaintiff has asserted a violation of federal law).

AFFIRMED.

Case Number:_____

IN THE
SUPREME COURT OF THE UNITED STATES

ROSE RUIZ,

Petitioner,

v.

BARBARA MCDONNELL,
Executive Director of the Colorado Department of Human Services, COLORADO DEPARTMENT OF HUMAN SERVICES, WALTER SPECKMAN, Executive Director of the Weld County Department of Human Services, THE WELD COUNTY DEPARTMENT OF HUMAN SERVICES, RENEE L. and CHARLES GALLEGOS, VICTORIA and LEROY GALLEGOS, and JOHN DOES numbers one through four,

Respondents.

Certiorari from the U.S. Court of Appeals for the Tenth Circuit
Case Number 01-1010

APPENDIX "C" ORDER DENYING PETITION FOR REHEARING BY THE TENTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROSE RUIZ, Plaintiff – Appellant, vi. BARBARA MCDONNELL, Executive Director of the Colorado Department of Human Services; COLORADO DEPARTMENT OF HUMAN SERVICES; RENEEE L. GALLEGOS; CHARLES GALLEGOS; VICTORIA GALLEGOS; LEROY GALLEGOS, and John Does numbers one through four, Defendants-Appellees.	No. 01-1010

ORDER
Filed September 17, 2002

Before **HENRY**, Circuit Judge, **HOLLOWAY**, Senior Circuit Judge, and **VANBEBBER***, Senior District Judge.

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* The Honorable G. Thomas VanBebber, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

Entered for the Court
PATRICK FISHER, Clerk of Court

By:
Deputy Clerk